SINGAPORE REPORTS

AMERCO TIMBERS PTE. LTD. v. CHATSWORTH TIMBER CORPORATION PTE. LTD.

[C.A. (Wee Chong Jin C.J., Kulasekaram and Choor Singh JJ.) August 5, 1977]

[Singapore — Civil Appeal No. 1923 of 1976]

Conflict of Laws — Choice of jurisdiction — Whether to apply lex fori — Foreign jurisdiction clause in contract of carriage and bills of lading — Application for a stay — Court's discretionary power — Exercise of, only in exceptional circumstances

Practice and Procedure — Stay of action — Breach of agreement to submit disputes to foreign court — Discretion of Singapore court.

The barge "L2600" carrying a cargo of Ramin logs and towed by the tug "Jeddy X" was grounded in Indonesian waters. The cargo was found to be damaged by sea water. The plaintiffs/respondents as the owners or the persons entitled to the delivery of the said cargo comprised in the 2 bills of lading commenced an admiralty action in rem No. 305 of 1975 against the owners of the barge "L 2600" as first defendants and against the owners of vessels "Jeddy IV", "Jeddy VII", Jeddy X", "Jeddy XI" and "Jeddy XII" as second defendants and the present appellants *in personam*, as third defendants as the persons who issued the 2 bills of lading for damages and loss suffered by them. Only the third defendants/appellants have so far been served. They entered a conditional appearance and applied to have the writ set aside or alternatively for a stay of action on the ground that the 2 bills of lading had provided that "all actions under this contract shall be brought before the court at Djakarta." The application was first heard by the Deputy Registrar who dismissed the application with costs. The appellants' appeal against the said decision was dismissed by the learned judge. The appellants appealed against the said order.

Held, dismissing the appeal: (1) where a plaintiff sues in Singapore in breach of an agreement to submit their disputes to a foreign court, and the defendant applies for a stay, the Singapore court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant;

(2) in this case as all the evidence on the issues in the action is in Singapore or readily available here while little or no material evidence is situated in Indonesia the respondents have shown strong cause to refuse a stay of proceedings.

Case referred to:-

(1) *The "Adolf Warski"* [1976] 1 Lloyds Rep. 109, 114.

CIVIL APPEAL.

Joseph Grimberg for the appellants.

Dennis Murphy for the respondents.

Kulasekaram J. (delivering the judgment of the Court): 2523 pieces of Ramin logs were shipped on board the barge "L 2600" and towed by the tug "Jeddy X" for carriage from Pulau Pisau and Pamanggir, Indonesia to Singapore under 2 Bills of Lading dated August 29 and September 15, 1974 and numbered 1/74.

The said barge and tug left for Singapore on September 19, 1974 and while still in Indonesian waters had to be diverted to Sampit Bay, Indonesia where soon after arrival on September 21, 1974 the barge which was heavily listing to port was grounded. Singapore Salvage Engineers, a Singapore firm of salvors inspected and carried out salvage operations at the request of the appellants. Apparently this cargo of Ramin logs had been damaged by sea water.

Arising out of those transactions the plaintiffs/respondents as the owners or the persons entitled to the delivery of the cargo of Ramin logs comprised in the said 2 Bills of Lading commenced an admiralty action *in rem* No. 305/75 against the owners of the barge "L 2600" as 1st defendants and against the owners of vessels "Jeddy IV", "Jeddy VII", "Jeddy XI" and "Jeddy XII" as 2nd defendants for damages and loss suffered by them and in the same action sued Amerco Timbers Private Limited, *in personam*, as the 3rd defendants as the persons who issued or on whose behalf the said 2 Bills of Lading were issued for damages and loss suffered by them.

Only the 3rd defendants/appellants have so far been served, They entered a conditional appearance to the Writ of Summons and applied to have the writ set aside or alternatively for all further proceedings in the action as against them, the 3rd defendants, to be stayed on the ground that under the contract of carriage contained in the said 2 Bills of Lading the parties had provided that "all actions under this contract shall be brought before the court at Djakarta."

The application was first heard by the Deputy Registrar who dismissed the application with costs.

The 3rd defendants/appellants appealed to the High Court. The learned Mr. Justice Chua who heard this appeal dismissed it with costs and affirmed the order of the Deputy Registrar.

It is against this order of the High Court that the 3rd defendants as the appellants here appeal to this court.

There are two grounds of appeal:

(1) The judge did not properly exercise his discretion in that he failed to give proper consideration to the correct principles of law and the facts.

(2) He took into account irrelevant matters and failed to take into consideration relevant matters.

The appellants in support of their original application had filed 2 affidavits by Mr. Rodney L. Minchin, a director of the appellant company, the first of these dated February 25, 1976 and his second affidavit dated May 20, 1976 was a reply to an affidavit by Mr. Chew Charm Pan dated March 12, 1976 filed on behalf of the respondents to resist this application. Mr. Chew Charm Pan was the Marine Manager of The People's Insurance Company of Malaya Ltd. who had insured this cargo of Ramin logs and had paid the respondents' claim and are now subrogated to the respondents' rights.

The background and the nature of the dispute and all information relevant to this application come from the writ of summons, affidavits and the documents exhibited to the affidavits. The defendants do not now seek to set aside the writ but only to stay the action.

The law concerning an application for a stay is clear. Where a plaintiff sues in Singapore in breach of an agreement to submit their disputes to a foreign court, and the defendant applies to a stay, the Singapore Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The court in

exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so. To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, the court may have regard to the following matters, where they arise: —

(a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.

(c) With what country either party is connected and, if so, how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable here; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

The appellants in support of their application for a stay rely first on the agreed stipulation contained in clause 28 of the Bill of Lading which reads: —

"28. Jurisdiction. All actions under this contract be brought before the court at Djakarta and no other court shall have jurisdiction with regard to any such action unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto."

They further say that this stipulation was advisedly provided for at the appellants' instance because they carried on business mainly in Indonesian waters and practically all the voyages of their vessels owned or chartered by them began or ended in Indonesian ports and those vessels were almost invariably manned by Indonesian crew. They had contemplated that in the case of a dispute the court in Djakarta should have jurisdiction over it as it would be difficult to get the Indonesian crew to testify in a foreign jurisdiction.

In the instant case here at the time of the casualty the barge "L 2600" had no crew on board and the tug "Jeddy X" which was towing it was then manned by Indonesian crew. The master and crew of "Jeddy X" are all now in Indonesia and are no longer in the appellants' employ. Mr. Rodney L. Machin in his affidavit says it will be extremely difficult if not impossible to bring them to Singapore as witnesses and adds that their evidence will be highly material in these proceedings. They submit that substantial injustice would be done to them if they were made to proceed with the trial of this action in Singapore.

Finally Mr. Grimberg for the appellants took up a further point for the first time during the course of the hearing before us. He referred to clause 27 of the said Bills of Lading which is in these terms: —

"Law of application. In so far as anything has not been dealt with by the provisions of this Bill of Lading the Law of Indonesia shall apply.'

He went on to submit that as the Law of Indonesia applied to this contract the court in Djakarta would be a more suitable court to hear this claim. Besides, in the event of the appellants being dissatisfied with the decision on a question of law, they could appeal to a higher court. He would be denied this right in a trial in Singapore as any decision on question of the law of Indonesia would be treated as a question of fact and the appeal would be a limited one.

The plaintiffs/respondents on the other hand in resisting this application say that first they are a Singapore company, and the appellants, the 3rd defendants, too are a Singapore incorporated company. The barge and tug also have their registrations outside Indonesia and are not owned by the appellants. Moreover there are no arrangements between Singapore and Indonesia for the reciprocal enforcement of judgments. They therefore contend that if they were forced to proceed with this claim in Indonesia and were successful they may not be able to see the fruits of their judgment unless the appellants had assets in Indonesia of which they have no knowledge. It may well be that they would still have to sue the appellants in Singapore *albeit* on the the Indonesian judgment.

The second point urged by the respondents is on the Hague Rules. By clause 2 of the Bills of Lading this contract was subject to the Hague Rules as adopted by the International Convention in August 25, 1924. Now Indonesia has not adopted the Hague Rules as part of their domestic law. The Indonesian Courts it would appear have also not had occasion to deal with a case where the contract at issue was subject to the Hague Rules. On the other hand the Hague Rules form part of the laws of Singapore and cases concerning the interpretation of the Hague Rules have been dealt with before by the courts here. Besides English decisions on various issues involving the interpretation of the Hague Rules can be relied on in proceedings before the courts here. Therefore they say this is another reason why the court in Singapore rather than the court in Djakarta would be a more appropriate forum to hear this action.

Thirdly they referred to the circumstances of the casualty out of which this action stems. It would be convenient to set out here what Mr. Chew Charm Pan had to say in his affidavit on this aspect of the case because this is practically all the information that is available to this court regarding it besides the Singapore Salvage Engineers' report and the annexures to it which have also been exhibited to his affidavit. He says:

"From investigations carried out on behalf of my company by two marine surveyors based in Singapore it appears that the tug and tow left Bandjarmasin, Indonesia, at about 00.30 hours on September 19, 1974. At about 06.00 hours on

September 20, 1974, the tug and tow were diverted to Sampit Bay, and the tug and tow arrived at Sampit Bay at about 02.00 hours on September 21, 1974, at which time the barge was heavily listing to port, and a few hours thereafter the barge was grounded. Singapore Salvage Engineers, a Singapore firm, were engaged by or on behalf of the third defendants to salvage the barge and now produced shown to me and marked 'C.C.P.1' is a copy of their report."

The report from the Singapore Salvage Engineers also revealed that there were 4 holes at the bottom of the barge which had to be repaired before the barge was able to resume its voyage to Singapore.

From these circumstances the respondents allege what would be most relevant and in issue regarding the appellants' liability on the claim here would be the seaworthiness of the barge. Apparently, they would be contending that as a result of the unseaworthiness of the barge water got in and damaged the cargo.

They submit that all the evidence concerning the issue of seaworthiness of the barge would come from the experts mentioned here who had investigated and inspected the barge and from the maintenance records of the barge. All the witnesses who can speak on this issue are in Singapore or readily available in Singapore.

The only other important issue in this claim would be the extent of the damage and loss to the respondents' cargo. Messrs, Bork Singapore Pte. Ltd. who belong to an International Group and who are experts in timber were asked soon after the casualty to inspect the state of the logs in question and their evidence would be very relevant to establish the extent of damage and loss to the respondents' cargo.

The respondents assert that as practically all if not all the witnesses and other evidence on the likely issues involved in this claim are in Singapore for both the respondents and the appellants the court in Singapore rather than the one in Djakarta would be the more appropriate one to hear this action. It will mean less costs and less trouble to all the parties and the appellants will in no way be prejudiced by it.

The final point the respondents urge in their favour why this application should be refused is because they are time-barred to commence proceedings in Indonesia. Under the Hague Rules which apply to this contract of carriage they should have brought this action within one year and they were out of time at the time appellants made their application here.

Those are the respective stands of the appellants and the respondents regarding this application both in the High Court before Mr. Justice Chua and also before this court but with this qualification that the appellants through their counsel Mr. Grimberg made 3 slight modifications to their original stand during the course of the hearing before us. We have already referred to one of these modifications as the fresh additional point to support their application. We shall refer to the other 2 modifications in due course.

We now state our views on the arguments put forward by the parties.

The respondents' first point was that as the appellants are a Singapore incorporated company if they proceeded in the Djakarta Court and obtained judgment against them on their claim they may still not see the fruits of the judgment and may have to further proceed against them in Singapore. To our mind this is a factor which merits some consideration in their favour though the weight to be attached to it would be slight. This was one of the points where counsel for the appellants at the hearing before us modified his stand and said that in the event of this court granting the application the appellants would undertake to furnish sufficient security in Indonesia to meet the respondents' claim should they succeed in their action here. This modification, though late, negatives any advantage the respondents would have had earlier from it.

We next considered the point that as their contract was subject to the Hague Rules the Singapore Court would be the more appropriate one to hear such a matter. Both parties in their affidavits had referred to legal opinions they had respectively obtained from lawyers practising in Indonesia concerning the reception and the application of the Hague Rules by the courts at Djakarta. From these opinions we have no reason whatever to conclude that, though Indonesia had not adopted the Hague Rules and there have been no cases before the court at Djakarta involving the application and interpretation of the Hague Rules yet in appropriate cases such as the one here where the parties to a dispute had in their contract giving rise to the dispute agreed that Hague Rules would govern their transaction, the Indonesian Courts would fail to give effect to that agreement of the parties and apply the Hague Rules in relation to the transaction and the dispute arising from it or that they would be disinclined to refer for guidance where necessary to appropriate foreign court decisions relating to the interpretation of the Rules. That being so in our view this is not a factor that would help the respondents to resist the appellants' application for a stay of the Singapore proceedings.

Their third and main point is that all their witnesses in this action and practically all the appellants' witnesses, who would be mainly in the form of experts, are here in Singapore and the barge's maintenance records can also be made readily available in Singapore, if necessary. Therefore for all concerned the court in Singapore would be a more appropriate forum to deal with this action. It will be very convenient for all and no expenses need be incurred in transporting them to Indonesia and accommodating them in hotels there.

The appellants however have maintained that the master and crew of the tug "Jeddy X" who were all Indonesians are highly material witnesses for them in this action. They say it would be very difficult or almost impossible to get them to come to Singapore to give evidence. They are no longer in their employment and there is no way of compelling them to come to Singapore and testify in this action. This is the appellants' main additional point beside the fact that the parties here had in their contract specifically agreed for actions under the contract to be heard in the courts in Djakarta to support their application for a stay. In fact the appellants go so far as to say

it was because in actions of this sort concerning the carriage of goods they had envisaged that the master and crew of their vessel would be material witnesses and the difficulty they would experience in getting them to testify in a foreign jurisdiction that they made this specific provision in their Bills of Lading for the courts in Djakarta to have jurisdiction for actions under these contracts.

Mr. Chew in his affidavit in reply to Mr. Rodney L. Minchin's first affidavit had pointed out that all that Mr. Minchin had said on this point is that the evidence of master and crew of the "Jeddy X" would be "highly material" in these proceedings but had not explained why that was so. Mr. Rodney L. Minchin in his second affidavit, which was in reply to Mr. Chew's affidavit, did not however carry this matter any further but was merely content with saying that their evidence would be "crucial". It was Mr. Grimberg, the appellants' counsel, who submitted before Mr. Justice Chua that they needed the crew to show "how the stranding occurred" and later on in his further submission in reply that they wanted the crew to show that the holes were caused by the stranding.

Now Mr. Chew in the passage of his affidavit we have quoted above had said that when the barge arrived at Sampit Bay it was heavily listing to port and a few hours thereafter it was grounded. Moreover all the 4 holes discovered on the bottom of the barge were on its portside as can be seen from the Singapore Salvage Engineers' report and the 2 diagrams annexed to that report. From these circumstances the inference would be that the holes were there, at least some of them, before the stranding and that is what caused the barge to list heavily to its port. The appellants have neither denied this allegation that the barge was listing heavily to its port when it arrived at Sampit Bay before the stranding took place nor have they explained why it was so listing then. There is also no allegation by the appellants that there was any other stranding before it arrived at Sampit Bay.

The respondents would appear to have tried as best as they could to outline the events leading to the casualty out of which their claim arises and to indicate what the main likely issues would be in this action. They have also shown that all their witnesses on these issues and probably all the appellants' witnesses are in Singapore or readily available here. The appellants on the other hand have failed to show that the Indonesian Master and crew of "Jeddy X" would be material witnesses in these proceedings or that they would be seriously prejudiced without their evidence. There is no real circumstance before this court from which any inference could be drawn that the Master and crew of "Jeddy X" would be material witnesses in this action.

So, on this all important question here, in which country is the evidence on the issues in the action situated we find that practically all the evidence is in Singapore or readily available here while little or no material evidence is situated in Indonesia. We find that this factor not only gives weight to the respondents' stand to have this application dismissed but also fails to add any weight whatever to the appellants' *prima facie* case for a stay of proceedings here based on the foreign jurisdiction clause.

Next, there is the fresh point raised by the appellants that as Indonesian law governs this contract the court in Djakarta would be the more appropiate court to hear this action. There is no evidence before this court that Indonesian law differs from our law in any significant respect concerning matters relating to this claim or that there is likely to be any serious dispute on the application of Indonesian law to the issues in this case. Besides there is no material to show that a Singapore court would have any difficulty in applying Indonesian law should the need arise. There may be cases where complicated issues of law are likely to arise when the application of the law by a foreign court may not be desirable and at best avoided but there is no material before us to infer that this is one such case. That being so we would attach little weight to this factor.

We find, having regard to all the circumstances we have considered so far, that even without considering the further point of the respondents concerning their being time-barred to sue in Indonesia on this claim that the respondents have shown strong cause for us in the exercise of our discretion to refuse a stay of these proceedings.

Though in view of what we have decided it would not be necessary to consider this further point of the respondents we should express our views on this point as it is in relation to it that appellants' counsel made his third modification to their original stand. He indicated if the appellants' application for a stay were granted they would undertake to waive their defence of time bar if they can lawfully do so there and provided the respondents commenced proceedings in the next six months. If Indonesian law would not permit such a waiver this concession by the appellants would be of no avail to the respondents.

The appellants' original reaction to this point was that they were in no way to blame for the predicament the respondents find themselves in. The respondents they say could have taken steps to protect their rights in Indonesia by having taken appropriate action within the proper time. We would either attach no weight to this point of the respondents or have adopted the view preferred by Brandon J. in the case of *The "Adolf Warski"*[1] where in considering the same point of time bar he expressed his view *obiter* thus:

> "Provided that an action has been brought in time in England, I do not see that a defendant will, in general at any rate, be much prejudiced by the fact that a concurrent action to protect the time limit has not also been so brought in the chosen forum abroad. On that basis, assuming that it would be right, apart from the question of time bar, to enforce a foreign jurisdiction clause by staying an action here, I think that it would often be reasonable, unless real prejudice to the defendant is clearly proved, to make such enforcement subject to a condition that the defendant should waive reliance on the time bar if he can lawfully do so; or alternatively, if such waiver is not permissible, to refuse a stay."

If the alternative view of Brandon J. is the correct one then the appellants' concession, to meet the requirements indicated above would have to be completely effective and not, as here, only if the foreign

law permits it. If the first view is correct that this point carries no weight then this concession is not even necessary and makes no difference when tendered except to show that the appellants were not seeking merely a procedural advantage.

For these reasons this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*

THE "PERMINA 1017"; RASU MARITIMA S.A. v. THE "PERMINA 1017" (OWNERS) & ORS.

[O.C.J. (Choor Singh J.) August 13, 1977]

[Singapore — Motion in Admiralty in rem No. 377 of 1976]

Shipping — Admiralty suit in rem — Claim for non-payment of charter hire — Seizure of ship — Whether defendants "beneficially owned the ship" and therefore were liable — Meaning of "beneficially owned" — High Court (Admiralty Jurisdiction) Act (Cap. 6), ss. 3(1)(h), 4(4).

The plaintiffs' claim was for non-payment of instalments under a time-charter/hire purchase agreement dated August 23, 1973 in respect of the ship "Noga". Pertamina were the hirers of the Noga. The charter was not a demise charter since the plaintiffs retained possession.

Pertamina were the demise charterers with an option to purchase the "Permina 1017" and had the possession and control of the ship. However, Pertamina were not related to one A.C.T.F.S.S.I. the owners of "Permina 1017".

The plaintiffs claimed that Pertamina were the beneficial owners of "Permina 1017" and had the ship seized.

The crux of the dispute was the meaning of the words "any . . . ship which . . . is beneficially owned as respects all the shares therein by that person (Pertamina)."

The defendants moved to set aside the writ for want of jurisdiction.

Held, allowing the defendants' application: (1) the words "beneficially owned as respects all the shares therein" clearly indicate equitable ownership and cannot by any means cover cases of possession and control without ownership;

(2) as Pertamina were not the equitable owners of the "Permina 1017", the plaintiffs had no right to seize it for non-payment of instalments by Pertamina under the said time charter/hire purchase in respect of "Noga".

Cases referred to:-

(1) *The "Permina 108"* [1977] 1 M.L.J. 49.
(2) *The Andrea Ursula* [1973] P. 265.
(3) *The St. Merriel* [1963] P. 247.
(4) *The "Pangkalan Susu/Permina 3001"* [1977] 1 M.L.J. 141, affirmed by C.A. [1977] 2 M.L.J. 129.
(5) *The Eschersheim* [1976] 1 W.L.R. 339, 358E.
(6) *Wood Preservation Ltd.* v. *Prior* [1969] 1 W.L.R. 1077 (C.A.).

ADMIRALTY IN REM.

Richard Stone Q.C. (*S. Selvadurai* with him) for the defendants.

Michael Thomas Q.C. (*P. Selvadurai* with him) for owners of "Noga".

S. Rajkumar for American Capital Transportation Fifth Shop Sales Inc.

P. Selvam for Credit Commercial de France.

Choor Singh J.: The defendants moved this court to set aside the writ in these proceedings for want of jurisdiction. I allowed their application, set aside the writ and all subsequent proceedings and ordered the ship "Permina 1017" to be released. In doing so I stated that I would give reasons for my judgment later and I now proceed to do so.

The plaintiffs' claim in this action was non-payment of instalments under a time charter/hire purchase agreement dated August 23, 1973 in respect of the ship "Noga".

Documents filed in this case established that:

(a) Pertamina were the hirers of the "Noga" and the charter of August 23, 1973 was converted to a hire-purchase charter by rider dated July 7, 1975. The charter was not a demise charter since the plaintiffs retained possession.

(b) Pertamina were the demise charterers with an option to purchase the "Permina 1017" and had the possession and control of the ship.

(c) Pertamina were not related to American Capital Transportation Fifth Ship Sales Incorporated, the owners of "Permina 1017".

It was agreed by both parties that the plaintiffs' claim was a claim arising out of an agreement relating to the use or hire of a ship so as to come within section 3(1)(h) of the High Court (Admiralty Jurisdiction) Act (Chapter 6).

It was further agreed, subject to the meaning of the word "charterer", that Pertamina was the person who would be liable in an action *in personam* being the charterers of the "Noga" when the cause of action arose within the meaning of section 4(4) of the said Act.

The words of section 4(4) of the Act that fell to be construed on this motion are: —

"(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid."

In the context, and upon the facts of this case, "other" refers to a ship, other than "Noga". "At the time when the action is brought" means when the writ was issued. "As aforesaid" is a reference to sub-paragraph (a) so that the latter part of (b) should read in *extenso*.

". . . beneficially owned as respects all the shares therein by that person." "that person" in the context, and upon the facts of this case, is a reference to Pertamina who:

(a) are the persons who would be liable on the claim in an action *in personam* and

(b) were, when the cause of action arose, the charterers of the ship "Noga" in connection with which the claim arose.

It has been decided by the Court of Appeal in Civil Appeal No. 31 of 1976 (*The "Permina 108"*)[1] that in order to invoke an action *in rem* against "a sister ship" under clause (b) of section 4(4) of the Act, the sister ship does not have to be owned by the same person who owns the ship in respect of which